

_____ BILL NO. _____

INTRODUCED BY _____
(Primary Sponsor)

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING THAT ADMINISTRATIVE RULES ADOPTED BY AN EXECUTIVE BRANCH AGENCY PURSUANT TO THE MONTANA ADMINISTRATIVE PROCEDURE ACT ARE NOT EFFECTIVE UNTIL THEY ARE APPROVED BY THE LEGISLATURE AND PUBLISHED AFTER APPROVAL IN A DOCKET BY THE SECRETARY OF STATE; AMENDING SECTIONS 2-4-303, 2-4-305, 2-4-306, 2-4-307, 2-4-309, 2-4-311, 2-4-402, 2-4-412, AND 5-5-215, MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-4-303, MCA, is amended to read:

"2-4-303. Emergency or temporary rules. (1) ~~(a)~~ If an agency finds that an imminent peril to the public health, safety, or welfare requires adoption of a rule upon fewer than 30 days' notice, or requires an effective date before approval by the legislature and publishing in the secretary of state's dockets pursuant to [section 8], and states in writing its reasons for that finding, it may proceed upon special notice filed with the committee, without prior notice or hearing or upon any abbreviated notice and hearing that it finds practicable, to adopt an emergency rule. The rule may be effective for a period not longer than ~~120~~ 180 days, after which a new emergency rule with the same or substantially the same text may not be adopted, but the adoption of an identical rule under 2-4-302 is not precluded. Because the exercise of emergency rulemaking power precludes the people's constitutional right to prior notice and participation in the operations of their government, it constitutes the exercise of extraordinary power requiring extraordinary safeguards against abuse. An emergency rule may be adopted only in circumstances that truly and clearly constitute an existing imminent peril to the public health, safety, or welfare that cannot be averted or remedied by any other administrative act. The sufficiency of the reasons for a finding of imminent peril to the public health, safety, or welfare is subject to judicial review upon petition by any person. The matter must be set for hearing at the earliest possible time and takes precedence over all other matters except older matters of the same character. The sufficiency of the reasons justifying a finding of imminent peril and the necessity for emergency rulemaking must be compelling and, as written in the rule adoption notice, must stand on their own merits for purposes of judicial review. The dissemination of emergency rules required by

2-4-306 must be strictly observed and liberally accomplished.

(b)(2) An emergency rule may not be used to implement an administrative budget reduction.

~~(2) A statute enacted or amended to be effective prior to October 1 of the year of enactment or amendment may be implemented by a temporary administrative rule, adopted before October 1 of that year, upon any abbreviated notice or hearing that the agency finds practicable, but the rule may not be filed with the secretary of state until at least 30 days have passed since publication of the notice of proposal to adopt the rule. The temporary rule is effective until October 1 of the year of adoption. The adoption of an identical rule under 2-4-302 is not precluded during the period that the temporary rule is effective."~~

Section 2. Section 2-4-305, MCA, is amended to read:

"2-4-305. Requisites for validity -- authority and statement of reasons. (1) The agency shall fully consider written and oral submissions respecting the proposed rule. Upon adoption of a rule, an agency shall issue a concise statement of the principal reasons for and against its adoption, incorporating in the statement the reasons for overruling the considerations urged against its adoption. If substantial differences exist between the rule as proposed and as adopted and the differences have not been described or set forth in the adopted rule as that rule is printed in the register, the differences must be described in the statement of reasons for and against agency action. When written or oral submissions have not been received, an agency may omit the statement of reasons.

(2) Rules may not unnecessarily repeat statutory language. Whenever it is necessary to refer to statutory language in order to convey the meaning of a rule interpreting the language, the reference must clearly indicate the portion of the language that is statutory and the portion that is an amplification of the language.

(3) Each proposed and adopted rule must include a citation to the specific grant of rulemaking authority pursuant to which the rule or any part of the rule is adopted. In addition, each proposed and adopted rule must include a citation to the specific section or sections in the Montana Code Annotated that the rule purports to implement. A substantive rule may not be proposed or adopted unless:

(a) a statute granting the agency authority to adopt rules clearly and specifically lists the subject matter of the rule as a subject upon which the agency shall or may adopt rules; or

(b) the rule implements and relates to a subject matter or an agency function that is clearly and specifically included in a statute to which the grant of rulemaking authority extends.

(4) Each rule that is proposed and adopted by an agency and that implements a policy of a governing

board or commission must include a citation to and description of the policy implemented. Each agency rule implementing a policy and the policy itself must be based on legal authority and otherwise comply with the requisites for validity of rules established by this chapter.

(5) ~~To be effective, each~~ Each substantive rule adopted must be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law.

(6) Whenever by the express or implied terms of any statute a state agency has authority to adopt rules to implement, interpret, make specific, or otherwise carry out the provisions of the statute, an adoption, amendment, or repeal of a rule ~~is not valid or effective unless it is~~ must be:

(a) consistent and not in conflict with the statute; and

(b) reasonably necessary to effectuate the purpose of the statute. A statute mandating that the agency adopt rules establishes the necessity for rules but does not, standing alone, constitute reasonable necessity for a rule. The agency shall also address the reasonableness component of the reasonable necessity requirement by, as indicated in 2-4-302(1) and subsection (1) of this section, stating the principal reasons and the rationale for its intended action and for the particular approach that it takes in complying with the mandate to adopt rules. Subject to the provisions of subsection (8), reasonable necessity must be clearly and thoroughly demonstrated for each adoption, amendment, or repeal of a rule in the agency's notice of proposed rulemaking and in the written and oral data, views, comments, or testimony submitted by the public or the agency and considered by the agency. A statement that merely explains what the rule provides is not a statement of the reasonable necessity for the rule.

(7) A rule is not valid unless notice of it is given and it is adopted in substantial compliance with 2-4-302, 2-4-303, or 2-4-306 and this section ~~and, unless notice of adoption of the rule is published within 6 months of the publishing of notice of the proposed rule, and unless the rule is approved by the legislature as published in the dockets of the secretary of state as provided in [section 8].~~ If an amended or supplemental notice of either proposed or final rulemaking, or both, is published concerning the same rule, the 6-month limit must be determined with reference to the latest notice in all cases.

(8) An agency may use an amended proposal notice or the adoption notice to correct deficiencies in citations of authority for rules and in citations of sections implemented by rules. An agency may use an amended proposal notice but, except for clerical corrections, may not use the adoption notice to correct deficiencies in a statement of reasonable necessity.

~~(9) If a majority of the members of the appropriate administrative rule review committee notify the~~

~~committee presiding officer that those members object to a notice of proposed rulemaking, the committee shall notify the agency in writing that the committee objects to the proposal notice and will address the objections at the next committee meeting. Following notice by the committee to the agency, the proposal notice may not be adopted until publication of the last issue of the register that is published before expiration of the 6-month period during which the adoption notice must be published, unless prior to that time, the committee meets and does not make the same objection. A copy of the committee's notification to the agency must be included in the committee's records."~~

Section 3. Section 2-4-306, MCA, is amended to read:

"2-4-306. Filing, format, and adoption and effective dates -- dissemination of emergency rules.

(1) Each agency shall file with the secretary of state a copy of each rule adopted by it or a reference to the rule as contained in the proposal notice. A rule is adopted on the date that the adoption notice is filed with the secretary of state and is effective on the date referred to in subsection (4), except that if the secretary of state requests corrections to the adoption notice, the rule is adopted on the date that the revised notice is filed with the secretary of state.

(2) Pursuant to 2-15-401, the secretary of state may prescribe rules to effectively administer this chapter, including rules regarding the format, style, and arrangement for notices and rules that are filed pursuant to this chapter, approval of rules by the legislature, and publication of the secretary of state's dockets as provided in [section 8], and may refuse to accept the filing of any notice or rule that is not in compliance with this chapter. The secretary of state shall keep and maintain a permanent register of all notices and rules filed, rules approved by the legislature, and dockets published by the secretary of state pursuant to [section 8], including superseded and repealed rules, that must be open to public inspection and shall provide copies of any notice or rule upon request of any person. Unless otherwise provided by statute, the secretary of state may require the payment of the cost of providing copies.

(3) If the appropriate administrative rule review committee has conducted a poll of the legislature in accordance with 2-4-403, the results of the poll must be published with the rule if the rule is adopted by the agency.

(4) Each rule is effective after publication in the register, as provided in 2-4-312, and after the rule has been approved by the legislature and the rule dockets have been published by the secretary of state as provided in [section 8], except that:

(a) if a later date is required by statute or specified in the rule, the later date is the effective date; and

(b) subject to applicable constitutional or statutory provisions:

~~———— (i) a temporary rule is effective immediately upon filing with the secretary of state or at a stated date following publication in the register; and~~

~~———— (ii) an emergency rule is effective at a stated date following publication in the register or immediately upon filing with the secretary of state if the agency finds that this effective date is necessary because of imminent peril to the public health, safety, or welfare. The agency's finding and a brief statement of reasons for the finding must be filed with the rule. The agency shall, in addition to the required publication in the register, take appropriate and extraordinary measures to make emergency rules known to each person who may be affected by them.~~

~~(c) if, following written administrative rule review committee notification to an agency under 2-4-305(9), the committee meets and under 2-4-406(1) objects to all or some portion of a proposed rule before the proposed rule is adopted, the proposed rule or portion of the proposed rule objected to is not effective until the day after final adjournment of the regular session of the legislature that begins after the notice proposing the rule was published by the secretary of state, unless, following the committee's objection under 2-4-406(1):~~

~~———— (i) the committee withdraws its objection under 2-4-406 before the proposed rule is adopted; or~~

~~———— (ii) the rule or portion of a rule objected to is adopted with changes that in the opinion of a majority of the committee members, as communicated in writing to the committee presiding officer and staff, make it comply with the committee's objection and concerns.~~

(5) An agency may not enforce, implement, or otherwise treat as effective a rule proposed or adopted by the agency until the effective date of the rule as provided in this section the legislature has approved the rule and the secretary of state has published the rule docket as provided in [section 8]. Nothing in this subsection prohibits an agency from enforcing an established policy or practice of the agency that existed prior to the proposal or adoption of the rule as long as the policy or practice is within the scope of the agency's lawful authority."

Section 4. Section 2-4-307, MCA, is amended to read:

"2-4-307. Omissions from ARM or register. (1) An agency may adopt by reference any model code, federal agency rule, rule of any agency of this state, or other similar publication if the publication of the model code, rule, or other publication would be unduly cumbersome, expensive, or otherwise inexpedient.

(2) The model code, rule, or other publication must be adopted by reference in a rule adopted under the rulemaking procedure required by this chapter. The rule must contain a citation to the material adopted by reference and a statement of the general subject matter of the omitted rule and must state where a copy of the omitted material may be obtained. Upon request of the secretary of state, a copy of the omitted material must be filed with the secretary of state.

(3) A rule originally adopting by reference any model code or rule provided for in subsection (1) may not adopt any later amendments or editions of the material adopted. Except as provided in subsection (5), each later amendment or edition may be adopted by reference only by following the rulemaking procedure required by this chapter.

(4) If requested by a three-fourths vote of the appropriate administrative rule review committee, an agency shall immediately publish the full or partial text of any pertinent material adopted by reference under this section. The committee may not require the publication of copyrighted material. Publication of the text of a rule previously adopted does not affect the date of adoption of the rule, but publication of the text of a rule before publication of the notice of final adoption must be in the form of and is considered to be a new notice of proposed rulemaking.

(5) Whenever later amendments of federal regulations must be adopted to comply with federal law or to qualify for federal funding, only a notice of incorporation by reference of the later amendments must be filed in the register. This notice must contain the information required by subsection (2) ~~and must state the effective date of the incorporation.~~ The effective date may be no sooner than ~~30 days after the date upon which the notice is published~~ provided in [section 8] unless the 30 days delay for approval by the legislature causes a delay that jeopardizes compliance with federal law or qualification for federal funding, in which event the effective date may be no sooner than the date of publication. A hearing is not required unless requested under 2-4-315 by either 10% or 25, whichever is less, of the persons who will be directly affected by the incorporation, by a governmental subdivision or agency, or by an association having not less than 25 members who will be directly affected. Further notice of adoption or preparation of a replacement page for the ARM is not required.

(6) If a hearing is requested under subsection (5), the petition for hearing must contain a request for an amendment and may contain suggested language, reasons for an amendment, and any other information pertinent to the subject of the rule."

Section 5. Section 2-4-309, MCA, is amended to read:

1 **"2-4-309. Rulemaking authority for laws not yet effective -- rule not effective until law effective.**

2 Unless otherwise provided in the statute, an agency may proceed with rulemaking under this chapter after the
3 enactment of a statute to be implemented by rule, but a rule ~~may not become~~ is not effective prior to the effective
4 date of the statute and before the rule is approved by the legislature and the secretary of state has published the
5 rule in the rule dockets as provided in [section 8]."

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7 **Section 6.** Section 2-4-311, MCA, is amended to read:

8 **"2-4-311. Publication and arrangement of ARM.** (1) The secretary of state shall compile, index,
9 arrange, rearrange, correct errors or inconsistencies without changing the meaning, intent, or effect of any rule,
10 and publish in the appropriate format all rules filed pursuant to this chapter in the ARM and all rule dockets
11 published in accordance with [section 8]. The secretary of state shall supplement, revise, and publish the ARM
12 or any part of the ARM as often as the secretary of state considers necessary. The secretary of state may include
13 editorial notes, cross-references, and other matter that the secretary of state considers desirable or
14 advantageous. The secretary of state shall publish supplements to the ARM at the times and in the form that the
15 secretary of state considers appropriate.

16 (2) The ARM must be arranged, indexed, and printed or duplicated in a manner that permits separate
17 publication of portions relating to individual agencies. An agency may make arrangements with the secretary of
18 state for the printing of as many copies of the separate publications as it may require. The secretary of state may
19 charge a fee for any separate publications. The fee must be set and deposited in accordance with 2-15-405 and
20 must be paid by the agency."

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22 **Section 7.** Section 2-4-402, MCA, is amended to read:

23 **"2-4-402. Powers of committees -- duty to review rules.** (1) The administrative ~~rules~~ rule review
24 committees shall review all proposed rules filed with the secretary of state.

25 (2) The appropriate administrative rule review committee may:

26 (a) request and obtain an agency's rulemaking records for the purpose of reviewing compliance with
27 2-4-305;

28 (b) prepare written recommendations for the adoption, amendment, or rejection of a rule and submit
29 those recommendations to the department proposing the rule and submit oral or written testimony at a rulemaking
30 hearing;

(c) require that a rulemaking hearing be held in accordance with the provisions of 2-4-302 through 2-4-305;

(d) institute, intervene in, or otherwise participate in proceedings involving this chapter in the state and federal courts and administrative agencies;

(e) review the incidence and conduct of administrative proceedings under this chapter.

(3) The administrative rule review committees shall prepare written recommendations for the approval of a rule by the legislature."

NEW SECTION. **Section 8. Procedure for approval of rules by legislature.** In order to be effective as law, a rule must be approved by the legislature and the rule must be published in the rule dockets of the secretary of state as provided in this section. Before the convening of the legislature, the secretary of state shall prepare a docket of all rules adopted by state agencies pending approval by the legislature, publish the docket in the register, and transmit the docket to the legislative services division for approval by the legislature. A rule that has been forwarded to the legislature in the docket prepared by the secretary of state pursuant to this section may, after consideration of any recommendation by an administrative rule review committee, be approved or rejected but may not be amended by joint resolution. The rule number of a rule approved by joint resolution must be published in a docket prepared by the secretary of state and is effective the day following publication of the docket of approved rule numbers in the register. The legislative council may adopt procedures to implement this section.

Section 9. Section 2-4-412, MCA, is amended to read:

"2-4-412. Legislative review of rules -- effect of failure to object. (1) The legislature may, by bill, repeal any rule in the ARM. If a rule is repealed, the legislature shall in the bill state its objections to the repealed rule. If an agency adopts a new rule to replace the repealed rule, the agency shall adopt the new rule in accordance with the objections stated by the legislature in the bill. If the legislature does not repeal a rule filed with it before the adjournment of that regular session pursuant to this section, the rule remains valid.

(2) The legislature may also by joint resolution request or advise or by bill direct the adoption, amendment, or repeal of any rule. If a change in a rule or the adoption of an additional rule is advised, requested, or directed to be made pursuant to this section, the legislature shall in the joint resolution or bill state the nature of the change or the additional rule to be made and its reasons for the change or addition. The agency shall, in

the manner provided in the Montana Administrative Procedure Act, adopt a new rule in accordance with the legislative direction in a bill.

(3) Rules and changes in rules made by agencies under subsection (2) must conform and be pursuant to statutory authority.

(4) Failure of the legislature or the appropriate administrative rule review committee to object in any manner to the adoption, amendment, or repeal of a rule is inadmissible in the courts of this state to prove the validity of any rule.

(5) The legislature may approve a rule only by the process provided for in [section 8]."

Section 10. Section 5-5-215, MCA, is amended to read:

"5-5-215. Duties of interim committees. (1) Each interim committee shall:

(a) review administrative rules within its jurisdiction and, if a rule is reviewed by the committee pursuant to [section 8], prepare a written recommendation to the legislature whether the rule should be approved pursuant to that section;

(b) subject to 5-5-217(3), conduct interim studies as assigned;

(c) monitor the operation of assigned executive branch agencies with specific attention to the following:

(i) identification of issues likely to require future legislative attention;

(ii) opportunities to improve existing law through the analysis of problems experienced with the application of the law by an agency; and

(iii) experiences of the state's citizens with the operation of an agency that may be amenable to improvement through legislative action;

(d) review proposed legislation of assigned agencies or entities as provided in the joint legislative rules; and

(e) accumulate, compile, analyze, and furnish information bearing upon its assignment and relevant to existing or prospective legislation as it determines, on its own initiative, to be pertinent to the adequate completion of its work.

(2) Each interim committee shall prepare bills and resolutions that, in its opinion, the welfare of the state may require for presentation to the next regular session of the legislature.

(3) The legislative services division shall keep accurate records of the activities and proceedings of each interim committee."

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2 NEW SECTION. **Section 11. Codification instruction.** [Section 8] is intended to be codified as an
3 integral part of Title 2, chapter 4, part 4, and the provisions of Title 2, chapter 4, part 4, apply to [section 8].

5 NEW SECTION. **Section 12. Applicability.** [This act] applies to rules adopted by an agency on or after
6 October 1, 2009.

- END -